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Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

TDC MANAGEMENT CORPORATION, INC.
and T. CONRAD MONTS,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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36 pp

## QUESTIONS PRESENTED

Petitioners won a judgment against the United States rendered by the Department of Transportation ("DOT") Board of Contract Appeals ("the Board"). Later, the United States was granted a summary judgment against petitioners for $1.2 million under the False Claims Act, based on the collateral estoppel effect of certain alleged findings of fact in the Board Opinion *even though petitioners had won the case before the Board and thus could not contest such findings.* The circuit court held that such reliance upon collateral estoppel was "clear legal error by the district court." But, the court declined to reverse solely because the petitioners did not object in the trial court, holding that it could ignore the failure to object below only if "the result would be a plain miscarriage of justice." The questions presented, therefore, are:

1. Whether the decision below conflicts with decisions of other circuits and of this Court because it erroneously held that a controlling issue of collateral estoppel law, clearly wrongly decided by, but not raised in the trial court, could be reversed on appeal only if there were "a manifest injustice"?

2. Should not this Court exercise its supervisory power to correct a "clear manifest injustice" imposed by the court below at the request of, and for the sole benefit of, the federal government against one of its citizens?

## LIST OF PARTIES

The parties to the proceeding below were:

The United States of America, Plaintiff-Appellee;

TDC Management Corporation, Defendant-Appellant; and

T. Conrad Monts, Defendant-Appellant.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, petitioner TDC Management Corporation, Inc. ("TDC") hereby states as follows:

1. TDC has no parent corporation(s); and

2. No publicly held company owns 10% or more of TDC's stock.

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Petitioners, TDC Management Corporation ("TDC") and T. Conrad Monts ("Monts") respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 3, 2002, a timely petition for rehearing denied on July 5, 2002. The issue on which review is sought is in plain and irreconcilable conflict with cases in other federal circuits and opinions of this Court.

## OPINIONS BELOW

On May 3, 2002, the District of Columbia Circuit issued the opinion (Appendix "App." 1a - 15a) from which this petition is brought. That opinion is now reported as United States v. TDC Management Corp., 288 F.3d 421 (D.C.Cir. 2002). The July 5, 2002 Order of the District of Columbia Circuit denying rehearing of that judgment on July 5, 2002. (App. 16a) is unreported. An earlier decision by the District of Columbia Circuit on a prior appeal in this case is reported at 24 F.3d 292 (D.C.Cir. 1994).

## JURISDICTION

The final judgment of the District of Columbia Circuit affirming the erroneous summary judgment entered against petitioners[1] by the district court was issued on May 3, 2002. A timely petition for rehearing of that decision was denied on July 5, 2002. See App. 16a. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the decision below. This petition is timely under Supreme Court Rule 13.3.

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[1] There is some question whether the judgment entered against Monts personally is valid. See App. 14a.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "No person shall be . . . deprived of . . . property, without due process of law."

## STATEMENT OF THE CASE

This petition presents a simple, but extremely important, recurring, question of appellate procedure, with significant constitutional overtones. The question is under what circumstances, if any, a federal court of appeals can simply refuse to reverse an admittedly erroneous summary judgment granted to its coordinate branch of Government, the Executive Branch. In this case, the District of Columbia Circuit refused to correct such an admittedly erroneous judgment on the ground that the purely legal issue – *which the court actually decided should have prevented the granting of summary judgment as a matter of law* – was not first raised in the district court. We are aware of no other court which has ever reached a similar holding, after actually deciding that such a clear and fundamental legal error had been made in a case. To the contrary, the other federal circuit courts of appeal, following the guidance of this Court, would plainly have reversed the summary judgment below precisely because the impediment to its propriety was such a clear issue of law, beyond any doubt as to its proper resolution, and has implications that it violates the Fifth Amendment.

**Prior Proceedings**

This case turns on the purported collateral estoppel effect of certain alleged findings made in the proceeding before the DOT Board — a proceeding in which petitioners were the prevailing parties. TDC, a small business entity, had entered into a best-efforts cost-reimbursement contract with the DOT to devise and implement a bonding program for minority contractors (the "Program"). *See* App. 2a. The DOT eventually terminated the contract for convenience before TDC could complete implementation of the Program, and it denied TDC reimbursement of certain costs. TDC asked the Board to review the DOT's denial of reimbursement, which led to a full trial on the merits before the Board. *Id.*

The most important issue before the Board was whether TDC was at fault for the failure of the Bonding Program, or whether that failure was attributable to the DOT's termination of the contract. In a lengthy opinion, the Board concluded that the DOT, rather than TDC, should bear the blame for the Program's failure. According to the Board, the "dispositive factor" in the case was the fact that there was "no evidence in the record that the Program failed for any reason other than [the DOT] electing not to fund the balance of the contract, but to terminate TDC's performance." App. 5a (quoting Board Opinion at 133). Because the Program's failure was attributable solely to the Government, the Board held that most of TDC's asserted costs were reimbursable.

In making its determination regarding the cause of the Program's failure, the Board also considered the Government's claim that TDC allegedly omitted certain facts from the progress reports it submitted to the Department along with its requests for reimbursement. *See* App. 3a.

Ultimately, however, any Board's findings with regard to the alleged omissions played no part in the Board's ultimate determination in Petitioners' favor.

On the strength of the Board's opinion, TDC sought summary judgment in a False Claims Act suit that the Government had brought in tandem with the Board appeal. App. 3a. The district court granted TDC's motion, based on the collateral estoppel effect of the Board's holding in TDC's favor. The District of Columbia Circuit affirmed in part and reversed in part, holding that, while the district court was correct about the collateral estoppel effect of the Board's findings with respect to affirmative misrepresentations made by TDC in its progress reports, the same could not be said about the alleged omissions, and it remanded for further proceedings. *See id.*; *see also United States v. TDC Management Corp.*, 24 F.3d 292, 296 (D.C. Cir. 1994).

The "clear error by the district court" identified in the court below, App. 5a, arose after such remand. On remand, the Government sought summary judgment on the basis of the Board's statements in the Board's opinion with respect to the alleged omissions, arguing that *the Government* was now entitled to reap the benefits of collateral estoppel, even though it did not prevail before the Board. The Government claimed that the Board's findings with respect to TDC's alleged omissions were entitled to collateral estoppel effect; the district court agreed and granted the Government's motion. App. 4a.

With the aid of new counsel, because former counsel – a sole practitioner – had died, petitioners raised a new legal argument for the first time on appeal. The new argument was that collateral estoppel was completely inapplicable to the facts given dispositive weight by the district court, because petitioners had actually prevailed in

the prior proceeding at which those facts were adduced and therefore had no ability to contest those findings. It is blackletter law that such findings, which are contrary to the actual holding of a case in a party's favor, "have long been accepted as paradigms of the unnecessary conclusions that are not preclusive in later litigation." 18 Wright, Miller & Cooper, Federal Practice And Procedure, Section 4421 at 199 (1981); accord, Fletcher v. Atex, Inc., 68 F.3d 1451, 1458 (2d Cir. 1995); Balcom v. Lynn Ladder and Scaffolding Co., 806 F.2d 1127, 1127 (1st Cir. 1986); Fireman's Fund Ins. Co. v. International Market Place, 773 F.2d 1068, 1069-70 (9th Cir. 1985). Easily recognizing the teaching of this blackletter law, the District of Columbia Circuit clearly and explicitly acknowledged that petitioners' new strictly legal argument was correct. Indeed, the circuit court found that the district court committed a "clear legal error" in employing the doctrine of collateral estoppel to grant summary judgment against the petitioners, on the basis of a prior proceeding which the petitioners had actually won. App. 5a.

The District of Columbia Circuit, however, refused to reverse the summary judgment on that ground for a reason contrary to, and in conflict with, established case law. It said it could accept the new argument of law only if failure to do so would be a great manifest injustice. The circuit court's failure to exercise its discretion here thus was flatly contrary to precedent of this Court and the settled law in the other Circuits, and presents a question of exceptional importance for this Court to resolve. The court's refusal to reverse the erroneous holding below on the basis of petitioners' argument that is correct as a matter of law implicates an overarching concern about the integrity of judicial review in general: when a district court has made such a clear error of law that it can be determined with ease and with unanimity by three circuit judges, and when that

clear error of law was the dispositive factor in denying petitioners' fundamental right to a trial on serious charges brought by the Government, are not the federal courts required to exercise their discretion to get it right? And is not the imposition of damages over 1.2 million dollars a gross manifest injustice in such circumstances?

## REASONS FOR GRANTING THE WRIT

The distinguishing factor in this case is that the circuit court below expressly recognized that the petitioners' new, strictly legal argument identified a "clear error by the district court." App. 5a. But the District of Columbia Circuit declined to reverse the judgment below, however, because it misconstrued the applicable precedents of this Court and conflicting decisions from other circuits as well concerning its power, duty, and requirement to do so. These precedents set forth the established factors that are to control the exercise of a court's discretion to entertain and decide new arguments raised for the first time on appeal. Under these factors, petitioners' new legal argument unquestionably required the court below to exercise its discretion in their favor.

### I. The Decision Below Is Inconsistent With Authority of This Court and Conflicts With the Holdings of Other Circuits.

In this case, the District of Columbia Circuit took an erroneous view of its authority to entertain and decide a new issue of law presented for the first time on appeal. In that court's view, it could exercise its discretion to decide such an issue only when necessary to prevent "a manifest injustice." App. 9a. The caselaw, however, establishes a different set of criteria and clearly shows that the Panel's refusal to exercise its discretion here conflicted

with all established precedent. As this Court has previously explained, "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt *or* where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (emphasis added; citations omitted); *see also Hormel v. Helvering*, 312 U.S. 552, 555-59 (1941). The *disjunctive* in this Court's statement clearly demonstrates that "injustice" is not the only mandatory requirement for entertaining a new, strictly legal argument on appeal — which makes sense, because all federal courts also have a fundamental obligation to see that the law is applied correctly to the parties who come before them. Yet here the court concededly failed to fulfill the latter obligation, by refusing to reverse a summary judgment which it found to be based on an undoubtedly flawed legal premise.

Other circuit courts of appeal furthermore have repeatedly recognized that "manifest injustice" is not the only situation in which the court must entertain a new, strictly legal argument on appeal. An equally clear situation is where the error overlooked is a clear error of law. *See, e.g., National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995) (applying multi-factor test to determine whether "extraordinary circumstances" exist); *Austin v. Healey*, 5 F.3d 598, 601 (2d Cir. 1993) (noting only that new argument raises pure question of law and implicates separation of powers doctrine); *Pennsylvania Environmental Defense Foundation v. Canon-McMillan School District*, 152 F.3d 228, 234 (3d Cir. 1998) (noting that court of appeals may reverse district court's "clear deviation from an established legal rule," even if objection not preserved); *Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992) (noting that court of appeals may entertain new argument "where the proper resolution is beyond any doubt" and where "the errors

or omissions are obvious, unfair or undermine the integrity or public confidence of judicial proceedings"); *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980) (asking only whether new argument involves solely a question of law that does not rely on factual record and whether proper resolution of question is beyond any doubt).

Under any reasoned application of the traditional factors, the present case clearly constitutes an "exceptional" situation in which the court's discretion should have been exercised. First, it was a clear error of law. Second, because the district court's judgment admittedly rests on a "clear error" of law, it would be manifestly unjust to allow the $1.2 million judgment against petitioners to stand. *See Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (in considering legal issue raised for first time on appeal and reversing award of punitive damages, court of appeals notes that "there can be no question that any error that costs a party $300,000.00 dollars [*sic*] is 'so fundamental as to result in a miscarriage of justice'"). Third, the United States Government should not be permitted to prevail against one of its citizens in such an unfair way. *See*, Fifth Amendment.

Even putting aside the dollar value of the judgment, this case is exceptional for two additional reasons. *First*, the Panel agreed that the Petitioners' new argument was correct and that there was "obvious" legal error by the district court. App.9a. The fact that the court below did so demonstrates that the legal issue raised by Petitioners' new argument is highly exceptional. *Second*, this is not a typical case of waiver. Although Petitioners may not have, in the view of the court below, raised the collateral estoppel issue squarely in the district court, it was clearly present throughout. Most importantly, the issue was part of the

lower court's first opinion in this case, which held that the collateral estoppel treatment of the alleged omissions was different from that of the affirmative misrepresentations. *See*, 24 F.3d at 296. The "law of the case" implications from the court of appeals' prior opinion should plainly have put both the Government and the district court on notice of the "clear error" in the positions they took concerning collateral estoppel below.

All things considered, this is plainly a case in which the Panel was required to exercise its discretion to accept as dispositive petitioner's new argument, because such new argument satisfies the factors this Court and all circuits who have considered the issue have adopted as requirements for the exercise of discretion. Like the issues in *Roosevelt* and the other cases discussed above, the petitioners' new issue in the court below was purely a question of law and it needed no additional factual development. Moreover, the issue had been fully briefed below by both parties. And because the Panel Opinion itself agreed that the petitioners' legal position was the correct one, the proper resolution of the issue was "beyond any doubt" (*Railroad Yardmasters*, 721 F.2d at 1337). Finally, petitioners did not intentionally omit the argument in the district court as a matter of trial strategy; any omission of the argument in the court below was entirely inadvertent. Petitioners were represented by other counsel in the summary judgment proceedings in the district court and the petitioners' "belated tender" of their collateral estoppel argument in the court below "[was] the product of a change in counsel . . . rather than a change in tactics." *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629 n.7 (1st Cir. 1995) (exercising discretion to decide legal question raised for first time on appeal, in part because failure to raise question below was inadvertent). In short, all of these factors weighed strongly in favor of demanding

entertainment of petitioners' argument on appeal in the court below.

In deciding whether to exercise its discretion, the District of Columbia Circuit completely ignored the standard factors for deciding whether a new legal argument was appropriate for resolution in the court of appeals which would have required a decision in petitioners' favor as a matter of law but instead considered two new factors that have never been recognized before, and a third — the question of potential prejudice — that necessarily required a "factual" determination for resolution. The three factors employed by the Panel to support its decision were: (1) that TDC and Mr. Monts were culpable for the False Claims Act violations based on alleged omissions from the progress reports; (2) that the Government would suffer prejudice if the court were to entertain this argument because of the death of a certain witness; and (3) the fact that TDC recovered its contract costs in the Board proceedings. App. 9a-11a. Petitioners have been unable to find any authority suggesting that (1) and (3) are appropriate factors for controlling a court's discretion, and the Panel cited none.[2] Thus, the only

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[2] Ironically, the second factor of potential "prejudice" to the Government relied upon by the court below was itself a new argument raised for the first time on appeal – by the Government – and yet it was one which the circuit court apparently felt itself able to decide despite the obvious "factual" component thereof (not in the record), despite the fact that petitioners were not provided with any opportunity to provide briefing on this issue, to present their own evidence, or to test the Government's evidence on this point. Nonetheless, on the basis of approximately two minutes worth of oral argument time alone, the Panel found that "there would be *obvious* prejudice to the government at a trial" due to a witness's death, (App.10a (emphasis added)). The relevant case law calls into question any automatic deference to the Government's assertion of prejudice; to the contrary, it is hornbook law that prejudice is never presumed – even in the case of a witness who has died – and that actual prejudice must be established as a matter of fact. *See, e.g., United States v. Hunter*, 197 F.3d 862 (7th Cir. 1999); *Bennett v. Lockhart*, 39

conclusion that can be drawn from this is that the court below's discretion was not guided by the precedents of this Court or any of its sister circuits — contrary to the centuries-old precept that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *United States v. Burr*, 25 F.Cas. No. 14,692d, pp.30, 35 (CC Va. 1807) (Marshall, C.J.)). The fact that a court has discretion "hardly means that it is unfettered by meaningful standards," *id.*, and the court may not apply a standard that "varies like the Chancellor's foot." *Id.* at 417. Because the court below failed to employ the correct "meaningful standards" in this case, it also failed to recognize that the new strictly legal argument before it was squarely *within* the area of the court's duty to consider and decide. In refusing to exercise that required discretion, the District of Columbia Circuit plainly rejected prevailing authority.

## CONCLUSION

This case is "exceptional" for many reasons. Petitioners have been unable to discover *any* reported case in which a federal court of appeals has actually found that a dispositive legal argument raised for the first time on appeal was correct, but then declined to apply that finding to reverse the erroneous judgment below. This is undoubtedly because it makes no systemic sense for a court to do so. Having decided the issue, the appellate court should plainly apply that decision to the case before it in order to avoid breeding disrespect for the law's perceived preference for procedural technicalities over substance. Petitioners submit that for the

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F.3d 848 (8th Cir. 1994); *United States v. Butz*, 982 F.2d 1378 (9th Cir. 1993).

circuit court to let stand a judgment after finding the legal underpinnings of that judgment to have been "clear error" is itself a manifest injustice of a kind that would "undermine the integrity or public confidence of judicial proceedings." *Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992).

In the absence of a "plain error" rule for civil cases in the federal system, the circuit courts of appeal have been left – under this Court's guidance - to establish the procedural ground rules for when a new legal issue can and cannot be decided on appeal. Obviously, it is important that the procedure in this regard be uniform around the country, lest litigants find themselves subject to varying results dependent upon the geographical location of their case. Under the established criteria for determining when an appellate court should consider and is required to decide a new legal issue raised for the first time on appeal, this is also an "exceptional" case in which the petitioners should have the advantage of a rule which is blackletter law..

Surely the supervisory power of this Court to see that fundamental justice is done to a citizen, particularly where the United States Government is on the other side of the case and will be the sole beneficiary of its ill-founded result, is sufficient to warrant this Court's review of the decision below. This Court should now take the final step in this case of ordering the court below to reverse the summary judgment against petitioners because of the patently improper application of collateral estoppel, admitted by the court below, that underlies such judgment.

For the foregoing reasons, the petition for writ of certiorari should be granted to ensure conformity among

the circuits on the issues of fundamental fairness raised herein.

Respectfully submitted,

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